A **SHANTA MANICKAM v. TEIK JOO CHAN SDN BHD & ANOR**

HIGH COURT MALAYA, IPOH
SM KOMATHY JC
[CIVIL APPEAL NO: 12BNCVC-33-03-2014]
12 AUGUST 2015

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NEGLIGENCE: *Occupier's liability – Who is an occupier – Lease of premise – Whether second defendant parted with possession and control of premise – Whether second defendant retained sole authority to determine persons permitted to enter premise – Whether second defendant owed duty of care to visitors*

C

CIVIL PROCEDURE: *Pleadings – Statement of claim – Cause of action – Whether plaintiff's cause of action based on vicarious liability or occupier's liability – Whether omission to add name of tortfeasor fatal to plaintiff's claim – Whether decision given by trial judge on one stage was binding on later stage – Whether trial judge could volte face decision passed at earlier stage*

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Letchumanan ('the deceased') was employed as a lorry driver by the first defendant. The deceased was instructed by the first defendant to go to the second defendant's premises (Westport Malaysia Sdn Bhd) to collect a shipment of corn. The deceased was issued a security pass by the second defendant to enter its premises for this purpose. At the second defendant's premise ('the site'), the deceased was knocked down by an excavator driven by one Tan Chun Huat. The deceased was pronounced dead upon arrival to the hospital. Subsequently, the wife of the deceased ('the plaintiff') commenced proceedings for damages under s. 7 of the Civil Law Act 1956 against the first and second defendants for herself and her children as dependants. However, the excavator driver was not cited and named as a co-defendant. The second defendant denied liability for the accident and alleged *inter alia* that; (i) it had no control over the site as the same had been leased to See Hoy Chan Agencies Sdn Bhd; and (ii) the excavator driver was not its employee. As such, the second defendant applied under O. 18 r. 19 of the Rules of Court 2012 ('ROC'), to strike out the plaintiff's claim ('striking out application') on the ground, amongst others, that the action was unsustainable on the basis that the plaintiff had failed to cite the excavator driver as a co-defendant despite having his particulars. The trial judge found that the plaintiff had only secured the excavator driver's particulars after limitation period had set in and dismissed the second defendant's striking out application. The plaintiff withdrew her claim against the first defendant and trial proceeded against the second defendant. At the close of the case, the plaintiff contended that the second defendant was liable for breach of duty to provide a safe system of work as the occupier of the site. On the other hand, the second defendant disputed that the plaintiff's cause of action was based on occupiers liability and contended that it was based on vicariously liability. It was pointed out that the term 'occupiers liability' was not mentioned in the statement of claim. In the alternative, the second defendant

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argued that the claim based on occupiers liability must fail on the ground that the second defendant was neither in occupation nor in control of the site which had been leased to See Hoy Chan Services Sdn Bhd at the material time. The Sessions Court Judge ('SCJ') found, contrary to her earlier finding in the striking out application, that the plaintiff was aware of the identity of the excavator driver and the failure to cite him as a co-defendant was fatal and dismissed the plaintiff's claim. Further, the SCJ went on to make a finding of fact that although the second defendant had control of the security and maintenance of the site, it was not the occupier. The occupier was See Hoy Chan Agencies Sdn Bhd by virtue of the lease agreement between the second defendant and See Hoy Chan Agencies Sdn Bhd. Hence the present appeal to the High Court.

Held (allowing appeal with costs; setting aside order of Sessions Court):

(1) It is trite that a litigant could not succeed on a unpleaded cause of action. Parties are bound by the pleadings and could not go beyond what had been pleaded. Whilst it was true that the term occupier's liability was not used in the statement of claim, a pleading need only aver the facts relied upon and need not state the legal effect of the facts, and further, that whether the existence of certain facts gives rise to a duty was a question of law which also need not be pleaded. The statement of claim drafted by the plaintiff's solicitors was far from a model of clarity. Nonetheless, it was possible to discern the following basic facts from the averments in para. 4 of the statement of claim. (para 23)

(2) The Sessions Judge having decided that the failure to cite the excavator driver was not fatal to the plaintiff's claim, was wrong in coming to a contrary decision at the conclusion of the trial. A decision given by a court at one stage on a particular matter or issue was binding on it at a later stage in the same suit or in a subsequent suit. (para 24)

(3) There may be more than one occupier of property, at the same time, for the purposes of occupier's liability, each of whom was under a duty of care to visitors. Occupation or control did not ordinarily follow from the mere fact of ownership. An owner who parted with the entire possession and control of his premises to his tenant, was not liable to the tenant or to the visitors of the tenant. However, an owner who retained the right to control the means of access owed a duty to all persons who may be lawfully in the building or in its vicinity to take reasonable care to see that they are safe. (para 30)

(4) It was not permissible for the second defendant to rely on the lease agreement to establish it was not the occupier. In the absence of the original lease agreement, the oral evidence of the witnesses as to the terms in this document become inadmissible. Bereft of the lease agreement, there was no evidence to show that the second defendant had divested itself of the occupation and control of the site. On the contrary,

the evidence of the second defendant's witnesses established that no person could enter the site without the permission of the second defendant. The fact that only a visitor issued with a pass by the second defendant could enter the site was important as showing that the second defendant was in law the occupier of the site. It was not open to the second defendant to suggest that excavator driver was not its employee in the absence of documentary evidence to show that the excavator did not belong to it. (paras 32 & 33)

Case(s) referred to:
Actew Corporation Ltd v. John Ivan Mihaljevic & Ors [2004] ACTSC 59 ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***
Janagi v. Ong Boon Kiat [1971] 1 LNS 42 HC ***(refd)***
Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***
Lembaga Kemajuan Tanah Persekutuan v. Mariam Mangu & Ors [1984] 1 CLJ 225; [1984] 1 CLJ (Rep) 197 FC ***(refd)***
Muniyandi Periyan & Anor v. Eric Chew Wai Keat & Anor [2003] 1 LNS 241 HC ***(refd)***
Wheat v. E Lacon & Co Ltd [1966] 1 All ER 582 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 7
Rules of Court 2012, O. 18 r. 19

For the appellant - M Karunananthan Muthuvelu (Sharul Shabaath Ali & Shamini A Mahalingam with him); M/s Shamini, Karu & Leong
For the respondent - Ramesh Sivakumar; M/s Ramesh & Loo

[Appeal from Session Court; Civil Action No: 53-396-04-2012]

Reported by Sandra Gabriel

JUDGMENT

SM Komathy JC:

[1] This is the plaintiff's appeal from the Sessions Court against the dismissal of its claim against the second defendant arising from an accident on 23 April 2009. The learned Sessions Judge dismissed the claim after a full trial on the ground that the second defendant, a corporation, was not liable vicariously as principal as the actual tortfeasor who was alleged to be responsible for the injuries which led to the death of the plaintiff's husband was not named as a co-defendant.

[2] The appeal was essentially confined to the question of liability.

The Brief Facts

[3] One Letchumanan a/l Subramaniam ("the deceased") was employed as a lorry driver by Teik Joo Chan Sdn Bhd, the first defendant. On 23 April 2009 the deceased and his lorry attendant Mogan a/l Ramasamy were instructed by the first defendant to go to the second defendant's (Westport

Malaysia Sdn Bhd) premises located in Port Klang to collect a shipment of corn. The deceased was issued a security pass by the second defendant to enter its premises for this purpose.

[4] At about 11am, the deceased and his attendant completed the task of loading the corn onto the lorry. Whilst the deceased was fixing the chain to the exterior of his lorry, he was knocked down by an excavator driven by one Tan Chun Huat. The deceased was rushed to hospital but was pronounced dead on arrival. On the same day, Yeap Jean Ming, the manager of Westport Warehouse Services Sdn Bhd, lodged a police report stating that their employee Tan Chun Huat, had informed him that "terdapat seorang pemandu lori BAE 4383 telah pengsan semasa kerja memunggah jagung ke dalam lori di dalam gudang". It bears mention that there was no mention in the report that Tan Chun Huat was the excavator driver who had knocked down the deceased.

[5] An inquiry was conducted by the second defendant some time in 2009 as regards this mishap. However, the report was not produced in court.

[6] In April 2012, the plaintiff, as the lawful wife of the deceased commenced proceedings for damages under s. 7 of the Civil Law Act 1956 against the first and second defendants for herself and her children being the dependents. The excavator driver was not cited and named as a co-defendant.

[7] On 30 July 2012, the solicitors for the second defendant wrote to the plaintiff asking for further and better particulars as to the place of accident and the identity of the excavator and its driver who had knocked down the deceased to enable it to file its defence. On being furnished the particulars, the second defendant delivered its defence acknowledging that the accident had taken place in the vicinity of See Hoy Chan Warehouse (hereinafter referred to as "the site"), but denied it was liable for the accident. It was alleged, *inter-alia*, that it did not own and had no control of the site where the accident took place as the same had been leased to See Hoy Chan Agencies Sdn Bhd and that the excavator driver was not its employee. The excavator driver was the employee of a company known as Westport Warehouse Services Sdn Bhd that had been engaged by See Hoy Chan Agencies Sdn Bhd to handle cargo handling operations.

[8] In March 2013, the second defendant applied under O. 18 r. 19 of the Rules of Court 2012, to strike out the plaintiff's claim on the ground that the action was unsustainable on the basis that the plaintiff had failed to cite the excavator driver as a co-defendant, despite having in possession his personal particulars. The second defendant argued that it could not be held liable vicariously in tort unless the excavator driver, the person responsible for the alleged tortuous act was named as a co-defendant, and shown to be its agent, servant or employee.

[9] On 10 June 2013, the application was dismissed by the trial judge. She found that the plaintiff had only secured his particulars after the limitation period had set in, when this information was disclosed to her by the second defendant's solicitors orally.

[10] On 10 June 2013, the plaintiff withdrew her claim against the first defendant, and the trial proceeded against the second defendant. A total of seven witnesses were called, including Mogan (the lorry attendant). At the close of the case, the plaintiff contended that the second defendant was liable for breach of duty to provide a safe system of work as the occupier of the site. The omission to cite the excavator driver as a defendant was not fatal as the plaintiff's claim was premised on occupier's liability.

[11] The second defendant disputed that the plaintiff's cause of action was based on occupier's liability. The second defendant contended that it was plain from a reading of the statement of claim that the cause of action was based on vicarious liability though the term was not expressly used. It was pointed out that the term "occupier's liability" was not mentioned in the statement of claim. In the alternative, it was argued that the claim based on occupier's liability must fail on the ground that the second defendant was neither in occupation nor in control of the site which had been leased to See Hoy Chan Services Sdn Bhd at the material time. Hence, See Hoy Chan Services Sdn Bhd was the occupier.

The Decision Below

[12] The Sessions Court Judge accepted the primary submission made on behalf of the second defendant and dismissed the claim. She found, contrary to her earlier finding in the striking out application, that the plaintiff was aware of the identity of the excavator driver and the failure to cite him as a co-defendant was fatal. It is implicit from her decision that she took the view that the averments pleaded in the claim indicated the action was based on vicarious liability and not occupier's liability.

[13] The Sessions Court Judge also went on to make a finding of fact that although the second defendant had control of the security and maintenance of the site, it was not the occupier. The occupier was See Hoy Chan Agencies Sdn Bhd by virtue of the lease agreement between the second defendant and See Hoy Chan Agencies Sdn Bhd.

Arguments On Appeal

[14] It was argued for the plaintiff in support of the appeal that the trial judge had erred in holding that the plaintiff's pleading was formulated on vicarious liability. The plaintiff relied on the averments contained in para. 4 of the statement of claim to contend that the claim was founded on occupier's illegibility.

[15] Secondly, the trial judge having made a finding in the plaintiff's favour in the striking out application that the failure to cite the excavator driver was not fatal, cannot do a volte face at the conclusion of the trial. She was bound by the decision.

[16] Thirdly, the trial judge having made a finding in the plaintiff's favour at the conclusion of the trial that the second defendant was in control of the security and maintenance of the premises, had erred in holding that this did not render it an occupier.

[17] Fourthly, that the lease agreement was inadmissible to prove that the premises had been leased. In any event, under the lease agreement the second defendant, had not parted with the entire possession and control of the premises to See Hoy Choy Agencies Sdn Bhd but had retained the sole authority to determine who was permitted to enter the site.

[18] For the second defendant, his counsel repeated the same arguments advanced at the trial. The omission to name the excavator driver was fatal and relied on the case of *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663, in support of this point. In the alternative, there were ambiguities in the plaintiff's pleaded case based on occupier's liability. The second defendant was not the occupier and had no duty to take reasonable care to see that the deceased would be reasonably safe while he was engaged upon his work at the premises. The occupier was See Hoy Chan Agencies Sdn Bhd.

The Issues On Appeal

[19] The issues in this appeal boils down quite simply to this: whether the plaintiff's claim is formulated on occupier's liability, and if so, whether the second defendant was the occupier of the premises. Thirdly, if the second defendant was the occupier did it, on the facts which appear on the evidence and the inferences to be drawn there from, owe, and fail in the discharge of, a duty owed to the deceased, by reason of its failure to take any steps to ensure that the deceased will be reasonably safe for the purpose permitted by the occupier by providing a safe system of work.

The Pleading Point

[20] I will deal first with the arguments canvassed on the pleading point. In this regard, it is necessary to reproduce para. 4 of the statement of claim:

> 4. Pada kesemua masa-masa yang material, si mati telah masuk ke premis defendant kedua atas arahan defendan pertama dan dengan pengetahuan atau kebenaran secara tersirat ataupun tersirat ataupun express oleh defendan kedua
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> (b) Paragraph 8 of 'butir-butir kecuaian defendan kedua'.
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> (c) gagal menyediakan tempat pekerjaan yang selamat kepada si mati
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> (g) gagal mengawal jentolak yang berada di kawasan defendan kedua;
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> (i) tidak menyediakan kawasan yang bersesuaian untuk si mati bekerja;

A (r) gagal menggunakan skil dan kebijaksaan secara munasabah dan keselamatan (safety) dalam keadaan itu;

(u) gagal untuk mengimplemenkan prosedur keselamatan;

(v) gagal untuk menyediakan pengawal keselamatan di premis defendan kedua.

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[21] In responding to the above averment, the second defendant denied that it was the owner or the occupier, so that no question of a breach of occupier's duty could arise. The occupier, if any, was See Hoy Chan Agencies Sdn Bhd. I set out the averments in the defence:

C 4. Defendan kedua menyatakan bahawa tempat di mana si mati didakwa telah memandu lorinya tidak merupakan premis defendan kedua dan sesungguhnya keseluruhan kawasan yang dimaksudkan oleh plaintiff tersebut telah berada dan masih berada dalam milikan (possession) dan kawalan (control) penuh dan esklusif suatu Syarikat yang dikenali sebagai See Hoy Chan Agencies Sdn Bhd (No. Syarikat 6756-X).

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[22] It is trite that a litigant cannot succeed on a unpleaded cause of action. Parties are bound by the pleadings and cannot go beyond what has been pleaded. The decisions in *Janagi v. Ong Boon Kiat* [1971] 1 LNS 42; [1971] 2 MLJ 196 and *Muniyandi Periyan & Anor v. Eric Chew Wai Keat & Anor* [2003] 1 LNS 241; [2003] 3 MLJ 527 sufficiently illustrate this point.

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[23] Whilst it is true that the term occupier's liability is not used in the statement of claim, it must be remembered that a pleading need only aver the facts relied upon and need not state the legal effect of the facts; and further, that whether or not the existence of certain facts gives rise to a duty is a question of law which also need not be pleaded. See *Actew Corporation Ltd v. John Ivan Mihaljevic & Ors* (2004) ACTSC 59. The statement of claim drafted by the plaintiff's solicitors is far from a model of clarity. Nonetheless, it is possible to discern the following basic facts from the averments in para. 4. Stating them briefly, on 23 April 2009, the deceased whilst permitted to be at the premises was knocked down by an excavator driven by its agent or employee. The area was owned and controlled by the second defendant. The second defendant was liable in failing to see that the deceased was reasonably safe in using the premises for the purpose for which he was permitted by the second defendant to be there. Paragraph 4 of the defence indicates that the second defendant was not taken by surprise. In any event, during the striking out application, the pleaded case of the plaintiff was clarified and made known to the second defendant.

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[24] Further, the Sessions Court Judge having decided that the failure to cite the excavator driver was not fatal to the plaintiff's claim, was wrong in coming to a contrary decision at the conclusion of the trial. In *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, the Court of Appeal was held that a decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit.

I

[25] For these reasons, I find myself in disagreement with the Sessions Court Judge on this point and find that the plaintiff's pleaded case is a claim founded on occupier's liability.

Whether Defendant Was The Occupier

[26] I now address the argument that brings me to the question whether the second defendant was the occupier. The plaintiff's case is predicated on her proving that the second defendant was the owner and the occupier of the place where the accident occurred. If the second defendant is not shown to be occupier, then no duty of care could have been incumbent on it and the case must fail.

[27] This leads on to a consideration of what requires to be proved in order to establish that a person is the occupier. In this regard, the words of Lord Denning in the decision of the House of Lords in *Wheat v. E Lacon & Co Ltd* [1966] 1 All ER 582 at p. 593 are worth reproducing:

> Wherever a person has a sufficient degree of control over premises that he ought to realise that any failure on his part to use care may result in injury to a person coming lawfully there, then he is an "occupier" and the person coming lawfully there is his "visitor"; and the "occupier" is under a duty to his "visitor" to use reasonable care. In order to be an "occupier" it is not necessary for a person to have entire control over the premises. He need not have exclusive occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be "occupiers". And whenever this happens, each is under a duty to use care towards persons coming lawfully on to the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure, but each may have a claim to contribution from the other.
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> In *Salmond Of Torts* (14th Edn, 1965) p. 372, it is said that an "occupier" is "he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons". This definition was adopted by Roxburgh J in *Hartwell v. Grayson Rollo and Clover Docks Ltd* ([1947] KB at p. 917), and by Diplock LJ in the present case ([1965] 2 All ER at p. 711, letter e). There is no doubt that a person who fulfils that test is an "occupier". He is the person who says "come in"; but I think that that test is too narrow by far. There are other people who are "occupiers", even though they do not say "come in". If a person has any degree of control over the state of the premises it is enough.

And at p. 595, His Lordship continued:

> In the light of these cases, I ask myself whether the respondents had a sufficient degree of control over the premises to put them under a duty to a visitor. ... All three of them were, in my opinion, "occupiers" of the private portion of the "Golfer's Arms". There is no difficulty in having more than one occupier at one and the same time, each of whom is under a duty of care to visitors. The Court of Appeal so held in the recent case of *Fisher v. CHT Ltd*.

A What did the common duty of care demand of each of these occupiers towards their visitors? Each was under a duty to take such care as "in all the circumstances of the case" was reasonable to see that the visitor would be reasonably safe.

[28] In *Lembaga Kemajuan Tanah Persekutuan v. Mariam Mangu & Ors* [1984] B 1 CLJ 225; [1984] 1 CLJ (Rep) 197; [1984] 1 MLJ 283 the appellants, a statutory authority under the Land Development Ordinance 1956, entered into a written agreement with a contractor to weed and maintain a land scheme in Pahang. Without the consent of the appellants, the work was sub-contracted and the deceased was one of the workers employed by the C sub-contractor. He and his fellow workers lived in a kongsi-house built on the scheme by either the contractor or the sub-contractor. The kongsi-house collapsed and the deceased was killed in the mishap. The dependants of the deceased sued the contractor, sub-contractor and the appellants based on occupier's liability. Judgment in default of appearance was entered against the contractor and sub-contractor and the case proceeded against the D appellants. The appellants denied liability (a) on the ground that the kongsi-house collapsed because of a whirlwind and they pleaded act of God and (b) that as the sub-contract was unauthorised, the sub-contractor's employee, that is, the deceased must in the circumstances of the case be a trespasser and as such the appellants owed him no duty of care at all. The High Court did E not accept these arguments and allowed the claim against the appellants. They appealed. It was argued that Felda was not an occupier because it had parted with exclusive possession of the site to the contractor under the written agreement.

F **[29]** In dismissing the appeal, the Federal Court alluded to the written agreement and observed (at p. 200 (CLJ); p. 286 (MLJ)):

> *In view of these provisions which show that not only the general control and supervision of the work but also the well-being of the labourers working in the Scheme were left with Felda, we think that Felda did not cease to be in possession of the site. After all an occupier is a person who has control over the relevant premises or site.* G *If an owner demised his premises he certainly parted with possession of it, but here the possession given was said to be not as complete as to amount to a tenancy. This fact coupled with the general control and supervision which Felda had clearly indicate that Felda was also an occupier of the Scheme. There is nothing wrong in having more than one occupier in respect of one site or premises. This is an agricultural contract and it is common knowledge that besides weeding for which Felda entered* H *into a contract with the contractor, there must be other works, such as planting, replanting, earth work, fertilising, insecticiding etc. which were required to be done.*
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> (emphasis added)

[30] It seems to me that the principles that can be distilled from these I authorities are, that there may be more than one occupier of property, at the same time, for the purposes of occupier's liability, each of whom is under a duty of care to visitors. Occupation or control do not ordinarily follow from the mere fact of ownership. A owner who parts with the entire

possession and control of his premises to his tenant, is not liable to the tenant or to the visitors of the tenant. On the contrary, an owner who retains the right to control the means of access owes a duty to all persons who may be lawfully in the building or in its vicinity to take reasonable care to see that they are safe.

[31] The question that arises is whether the second defendant parted with possession and control. The second defendant relied on the terms and conditions in the lease agreement as evidence that it did so. It is an evidential rule that the party seeking to rely on a document must produce the original document. It is apposite to mention here that at the trial, the second defendant's witness produced what was alleged to be the original lease agreement and a copy thereof. It transpired that there were discrepancies in the two documents. No explanation was proffered for the glaring discrepancy. In the absence of an explanation, the Sessions Court Judge on the objection of the plaintiff, marked it as ID. It is unarguable at law that a document marked as ID is not an exhibit and cannot be relied upon.

[32] In the result, it is not permissible for the second defendant to rely on the lease agreement to establish it was not the occupier. In the absence of the original lease agreement, the oral evidence of the witnesses as to the terms in this document become inadmissible. Bereft of the lease agreement, there was no evidence to show that the second defendant had divested itself of the occupation and control of the site. On the contrary, the evidence of the second defendant's witnesses established that no person could enter the site without the permission of the second defendant. The fact that only a visitor issued with a pass by the second defendant could enter the site is important as showing that the second defendant was in law the occupier of the site. This imposed on the second defendant a duty of care towards those who came lawfully onto the premises; a duty to take a reasonable care to provide a safe system of work to those permitted to enter to load goods at the site.

[33] For these reasons, I am unable to agree with the trial judge that the second defendant was not the occupier and not liable to provide a safe system of work. It is not open to the second defendant on the evidence to suggest that excavator driver was not its employee in the absence of documentary evidence to show that the excavator did not belong to it.

Conclusion

[34] For these reasons, I would allow the appeal and set aside the order made by the trial judge on the plaintiff's claim and enter judgment for the plaintiffs on their claim as prayed for in their statement of claim. As to costs, I would allow the plaintiffs their costs of this appeal.